SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 960

J. C. PATTERSON, ET AL.,

Petitioners,

vs.

THE TEXAS COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

J. I. KILPATRICK,
Counsel for Petitioners.

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PETITION FOR WRIT OF CERTIORARI.

I.

Summary Statement of Matter Involved.

In this case, the Circuit Court of Appeals for the Fifth Circuit held that cash money, overriding royalties, and division of profits contracted for, and cash money to be paid for each well to be drilled in the future, all in addition to the usual royalties provided for in the oil and gas leases, was ROYALTY and not BONUS. The Petitioners sued for a division of the BONUS alleged to have been derived under oil and gas leases, and their contract with the Respondent entitled them to a portion of any BONUS; therefore, the holding of the Circuit Court of Appeals deprived the Petitioners of substantial rights and was in conflict with other decisions as hereinafter pointed out.

Petitioners filed suit against the Respondent in United States District Court for the Northern District of Texas, Lubbock Division, and appealed from an adverse judgment. The judgment of the lower court was affirmed by the Circuit Court of Appeals.

The suit was for the recovery of Petitioners' proportionate part of a BONUS in the nature of cash and overriding royalties and rights reserved, which were received and to be received by Respondent for leases on mineral lands in which Petitioners own an interest, and for an accounting.

Petitioners executed to Mineral Investing Corporation, a subsidiary of Respondent, a conveyance of all oil, gas, and other minerals in 1600 acres of land in Yoakum County, Texas (R. 37). In their deed they provided that the Vendee, its successors and assigns, should have the right to execute a mineral lease or leases on said land, but in the event of lease, as a part of the consideration for the conveyance, the Petitioners should receive one-fourth (¼) of any BONUS received by the Vendee for any lease which might be executed on the land, one-fourth (¼) of any rentals received under any such lease, and in the event of production, one-thirty-second (1/32nd) of the minerals produced (R. 37).

The Mineral Investing Corporation conveyed to Respondent the mineral interest in the said lands (R. 366). The Respondent conveyed the property to Tom T. Freeman, Trustee (R. 370). Freeman was an employee of the Respondent and Trustee for it (R. 135). Freeman, as Trustee, executed three leases on the 1600 acres of land to the Respondent, for a recited consideration of $10.00 and other good and valuable consideration (R. 372). No consideration was actually paid for the leases (R. 135-136). The leases were dated December 30, 1938. They were the usual commercial leases and provided for the usual one-eighth (⅛) royalty (R. 127). The Respondent made no effort

at any time to lease the land to anyone else (R. 136-137), and it was handled in this manner for the convenience of The Texas Company (R. 171).

By an Agreement or assignment (Petitioners' Exhibit No. 7), dated December 31, 1938, the Respondent, The Texas Company, made a blanket assignment to Aloco Oil Company of forty-five (45) mineral leases on a total of 15,846 acres of land in Yoakum County, Texas, which assignment included the three leases involving the 1600 acres in question. This Agreement recited that the Respondent received from the Aloco Oil Company, for the assignment, the sum of $441,445.72 in cash, and was to receive certain overriding royalties and rights, and the payment of $3500.00 per well for each well drilled on the 15,846 acres. The Respondent refused to account to the Petitioners for any part of the consideration already received and to be received by it under the Agreement. Respondent admitted that it was "trying to make a deal on all of the properties as a whole in a large area"; and that the properties could be sold or let most advantageously by lumping them in the whole deal (R. 175).

The Petitioners contended and now contend that the consideration in cash and the overriding royalties and rights reserved in the Agreement were BONUS, and that they are entitled to their proportionate part of the consideration as spread over the entire acreage; that the manner of handling Petitioners' lands by the Respondent was a fraud upon the rights of the Petitioners and was done for the purpose of defeating Petitioners' rights to the BONUS received for the leases.

The Circuit Court of Appeals, in this case, held that the consideration for the Agreement, that is, the cash consideration and the overriding royalties and rights reserved, was ROYALTY and not BONUS, and that Petitioners were not entitled to receive any part thereof.

II.

Basis for Jurisdiction.

(1) The date of the judgment to be reviewed was December 7, 1942. Order overruling Motion for Rehearing was entered by the Court on January 26, 1943.

(2) This Court has jurisdiction of this suit under Supreme Court Rule 38, Section 5 (b). The decision of the Circuit Court of Appeals in this case is in conflict with the decision of the Circuit Court of Appeals for the Tenth Circuit in the case of *Wright* v. *Bush*, 115 Fed. (2d) 265; and is in conflict with the decisions in the case of *Sheppard* v. *Standard Oil and Gas Co.*, 125 S. W. (2d) 643. (Writ of error denied); and the case of *State National Bank of Corpus Christi* v. *Morgan*, 135 Tex. 509, 143 S. W. (2d) 757.

III.

Question Presented.

The consideration for the Agreement or assignment from The Texas Company to Aloco Oil Company, both as to cash and as to overriding royalties and rights reserved, and especially the latter, the usual royalty having been reserved in the lease, was BONUS and not ROYALTY, and Petitioners are entitled to receive their proportionate part of the BONUS which was spread over the entire acreage by the Agreement.

IV.

Reasons Justifying Writ.

The Circuit Court of Appeals for the Tenth Ciircuit, in *Wright* v. *Bush* (supra), held, under a similar state of facts, that BONUS, in connection with an oil, gas, or mineral lease is "a consideration for the lease over and above the usual royalty reservation, and it is immaterial whether the

additional consideration is paid in money or out of oil, so long as it does not come out of the usual and ordinary royalty reservation to the landowner." To the same effect are the holding in *Sheppard* v. *Standard Oil and Gas Company* (supra), and *State National Bank of Corpus Christi* v. *Morgan* (supra).

V.

Opinion of the Court Below.

The opinion in the United States Circuit Court of Appeals for the Fifth Circuit is reported in 131 Fed. (2d) 998.

Prayer.

Petitioners pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and to send to this Court for its review and determination, a full and complete transcript of the record and all proceedings in the cause numbered and entitled on its docket 10,168, J. C. Patterson, et al., Appellants, vs. The Texas Company, Appellee, and that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit may be reversed and this Petitioner may have such other and further relief in the premises as to this Honorable Court may seem lawful and just.

J. I. Kilpatrick,
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First National Bank Building,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 960

J. C. PATTERSON ET AL., *Petitioners*

vs.

THE TEXAS COMPANY, *Respondent*

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HERBERT S. GARRETT,
DURWOOD H. BRADLEY,
WALTER D. WILSON,
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The Texas Company.

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CASES CITED:

SUPREME COURT OF THE UNITED STATES

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No. 960

J. C. PATTERSON ET AL, *Petitioners*

vs.

THE TEXAS COMPANY, *Respondent*

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Supreme Court of the United States:

I.

OPINION BELOW

The opinion of the Circuit Court of Appeals, by Judge Hutcheson, is found in 131 Fed. (2d) 998, and at pages 481, 486 of the printed Record.

II.

JURISDICTION

The petition seeks to claim that the Circuit Court of Appeals has decided, in conflict with applicable local decisions and a decision of the Circuit Court of Appeals for the Tenth Circuit on the same matter, the question of local law of Texas as to what constitutes royalty for an oil and gas lease on Texas land.

This claim is not supported by the record.

III.

STATEMENT OF THE CASE

The petition for certiorari distinctly leaves the impression, if it does not directly assert, that a part of the $441,445.72 was bonus for leases on the land in controversy. The truth is that no part of the $441,445.72 was bonus for leases on the land in controversy —indeed, it was neither bonus nor royalty for leases on any land for that matter. The petition leaves the inference that the Circuit Court of Appeals deprived petitioners of a share of said $441,445.72 by holding that cash money paid for an oil and gas lease on Texas land is *royalty*. The Court did not make any such holding. Petitioners never had the slightest interest in said money and that ended the matter.

The land in controversy, which we hereafter call the "Patterson land", consists of Sections 856 and 900 and the North one-half of Section 901, Block D, John H. Gibson Survey, Yoakum County, Texas. R. 37.

The said sum of $441,445.72 was paid for improvements on other land than the Patterson land; it simply represented the cost of these improvements. Neither the improvements nor the money had anything to do with the Patterson land. Petitioners have no interest in this other land or in said improvements or in said money. Petitioners never had the slightest claim to this money or any part thereof. Leases on the Patterson land had no bonus value and no bonus was paid for such leases. All this is made perfectly plain by the record; there can be no question about it. The answer of respondent made it perfectly clear. R. 52-

62. It was established by ample and undisputed testimony; Wynne, President Aloco Oil Company, R. 110-125; Cole, Manager for respondent, R. 197, 299, 203, 206-209, 219-221, 221-267. The jury found it, Verdict of Jury, R. 87-89. The Circuit Court of Appeals said, R. 483, 131 Fed. (2d) 1000:

> "There were jury findings fully supported by the evidence; that the $441,445.72 paid The Texas Company by Aloco was not bonus but consideration for the 17 completed oil wells on lands other than plaintiffs'; that no bonus was paid for the leases on plaintiffs' land; and that they were without bonus value."

Again, footnote R. 483; 131 Fed. (2d) 1000:

> "It was established by uncontroverted proof that the $441,445.72 stated in the agreement as consideration, was not a bonus for making any of the leases, but was consideration for the improvements which had been placed by The Texas Company on certain tracts of leased lands and represented the cost of drilling 17 wells plus the expense of operating them to December 31, 1938, minus the value of the oil which The Texas Company had already obtained from the wells up to that time."

And again the Circuit Court of Appeals said, R. 485, 131 Fed. (2d) 1001:

> "Upon a full and fair charge and on evidence fully sustaining the verdict, the issue the pleadings presented, whether a cash bonus was paid for the Patterson leases, was submitted to the jury and found against plaintiffs. In addition,

the jury found that the Patterson leases had no cash bonus value. If, therefore, appellants' alternative position, that if no bonus was received appellee was bound to obtain reasonable bonus value for the leases and was liable to them for that value though not received by it, was well taken, and we by no means hold that it was (compare Cowden v. Broderick, 131 Tex. 434; Cullum v. Ford Motor Co., 107 Fed. (2d) 945; and Deeds v. Deeds, 196 Pac. 1109), appellant could not complain of the judgment, for the jury, on evidence supporting its finding, found that they had no cash value. In the face of these findings that no cash bonus was received for the leases and that they had no cash bonus value, it would be in complete contradiction of the verdict for the court to award plaintiffs a recovery."

———o———

The petition for certiorari implies, if it does not plainly charge, that the Circuit Court of Appeals held that if the Aloco Oil Company should drill wells on the Patterson land in the future, then the $3500 to be paid by Aloco Oil Company for each well drilled would constitute *royalty* for the leases on the Patterson land. Not so: the Circuit Court of Appeals recognized that the $3500 to be paid by Aloco for each paying well drilled by Aloco on the Patterson land constitutes a deferred, contingent bonus for the lease on the Patterson land—deferred because it will not be paid until in the future, if at all; contingent because the wells may never be drilled or, if drilled, may not produce oil in paying quantities, hence it may never be paid.

The Circuit Court of Appeals said, R. 483, footnote, 131 Fed. (2d) 1000:

> "Among the provisions of the assignment agreement was one for payment of rentals and for a contingent bonus of $3500.00 for each well drilled on each particular tract or tracts."

Again the Court said, R. 484, 485, 131 Fed. (2d) 1000, 1001:

> "The instrument by which plaintiffs sold is without ambiguity or need for construction. It plainly and clearly reserves to plaintiff a royalty interest and as plainly and clearly provides that if grantee, its successors or assigns, obtains a bonus for leasing the minerals, plaintiffs shall have one-fourth thereof. It as plainly and clearly provides, though that no obligation to lease the land or obtain a bonus is imposed, and leaves to the discretion of grantee whether, and the terms upon which, the land should be leased. It clearly gives plaintiffs a one-fourth interest in any bonus which may be reserved, and plaintiffs are, therefore, entitled to inquire and have determined in connection with any leasing made of the land what the true facts are. The Texas Company could not, therefore, by any form of agreement, have prevented plaintiffs from obtaining its share of a bonus if one was reserved, nor could plaintiffs claim a bonus on their land under instruments executed by The Texas Company, no matter what the terms of those instruments if, in fact, no bonus was received.
>
> " * * * Upon a full and fair charge and on evidence fully sustaining the verdict, the issue the pleadings presented, whether a cash bonus was

paid for the Patterson leases, was submitted to the jury and found against plaintiffs. In addition, the jury found that the Patterson leases had no cash bonus value."

Again at R. 483, 131 Fed. (2d) 1000:

"Defendant denied both that it had received anything by way of bonus for the Patterson leases except the contingent bonus agreement of $3500.00 for each well drilled, and that these leases had any bonus value, and set out fully the facts of the transaction between it and Aloco. There was a trial to a jury with a motion by plaintiffs for a directed verdict for 400/15,486 of the cash consideration paid, and the overriding royalties and rights accrued and to accrue to the defendant under the agreement with Aloco. The motion overruled, there were jury findings fully supported by the evidence; that the $441,445.72 paid The Texas Company by Aloco was not bonus but consideration for the 17 completed oil well on lands other than plaintiffs'; that no bonus was paid for the leases on plaintiffs' land; and that they were without bonus value."

Respondent's pleading shows that if the Patterson land should, perchance, be found to contain oil in paying quantities, it will gladly pay petitioners their share of the $3500 per well to be paid by Aloco for wells drilled by Aloco on the Patterson land, R. 59. Wynne, President of Aloco, R. 111, testified that Aloco would be delighted to drill on the Patterson land and pay the $3500 per well if they could get oil, R. 124-125. Cole, for respondent, R. 198, testified that it would require Aloco to drill on the Patterson lands

if conditions should warrant and would share with petitioners the $3500 per well on the Patterson land and had so advised petitioners, R. 261-263.

———o———

The petition attempts to assert that the Circuit Court of Appeals rendered a decision in conflict with the local rule of law and property in Texas as to what constitutes royalty for an oil and gas lease on Texas land and thus disallowed petitioners a recovery of one-fourth of the share of the product mined or share of the profits reserved by respondent.

But the Circuit Court of Appeals is certainly not in conflict with the local rule of Texas. The Circuit Court of Appeals fully and correctly recognized the Texas rule, viz.: Where, as here, lessor may be paid a share of the product mined or a share of the profits, or either or both, and such payment may continue *through the term of the lease*, such payment constitutes royalty,—the determining feature being the possible continuation of the payment *through the term of the lease.* This rule is made clear by the Texas Supreme Court in *State National Bank of Corpus Christi v. Morgan*, 135 Texas 509, at page 517, 143 S. W. (2d) 757, at page 761. The opinion of the Texas Supreme Court explains the case of *Sheppard v. Stanolind Oil & Gas Company*, 125 S. W. (2d) 643.

In the case at bar the Circuit Court of Appeals cites and quotes from the opinion of the Texas Supreme Court in *State National Bank of Corpus Christi v. Morgan*, R. 485-486, (131 Fed. (2d) 1001).

The Circuit Court of Appeals held, R. 485, 131 Fed. (2d) 1001:

> "In the face of these findings that no cash bonus was received for the leases and that they had no cash bonus value, it would be in complete contradiction of the verdict for the court to award plaintiffs a recovery. Appellant's claim that the overriding royalties reserved are bonus and not royalty is no better founded. These reservations of a share of the product or the profit, or both, continue throughout the term of the lease, and, therefore, come strictly within the accepted definition of 'royalty' as 'a share of the product or profit reserved by the owner for permitting another to use the property.' " Citing cases, including *State National Bank of Corpus Christi v. Morgan*, 135 Tex. 509, 143 S. W. (2d) 757, 761.

The petition also attempts to assert or suggest that the decision of the Circuit Court of Appeals for the Fifth Circuit in the case at bar conflicts with the decision of the Circuit Court of Appeals for the Tenth Circuit in *Wright v. Bush*, 115 Fed. (2d) 265, on the same matter. But the petition does not point out that the Court for the Tenth Circuit in the cited case had before it the local law of Kansas regarding an oil and gas lease on land in Kansas. No such question is involved in the instant case. The same matter was not before the two courts.

The petition makes the general charge that respondent has been guilty of fraud. There is not a scintilla

of evidence which raises the faintest whisper of support for this asseveration and it is utterly without merit.

———o———

In 1936 Mineral Investing Corporation, a wholly owned subsidiary of respondent, bought 31/32 of the oil, gas and other minerals in the Patterson land without making tests thereon, R. 145, and paid $14,400.00, R. 185. In 1937 Mineral Investing Corporation was dissolved and its assets conveyed to respondent. R. 366-369. The deed from petitioners to Mineral Investing Corporation contained the following, R. 37-39:

> "It is agreed that the Mineral Investing Corporation, its successors or assigns, shall never be under obligation to lease said land for oil, gas or mineral purposes but should the Mineral Investing Corporation, its successors or assigns, lease said land for oil, gas or mineral purposes, then one-fourth (1/4) of the bonus paid for said lease and one-fourth (1/4) of the rentals paid under said lease shall be paid to the Grantors herein, their heirs or assigns, as a part of the consideration for this conveyance. It being understood that the amount of bonus, rentals and royalties for which the Mineral Investing Corporation may execute a lease shall be at its sole discretion.
>
> "It is agreed that the Mineral Investing Corporation, its successors or assigns, shall never be under obligation to drill or mine for oil or gas or other minerals, but that such mining or drilling, both before and after production, shall be wholly at the option of said Grantee, its successors or assigns. However, should oil, gas or any other minerals be produced from said premises in paying

quantities by the Mineral Investing Corporation, its successors or assigns, then there shall be paid to Grantors, their heirs or assigns, as their interest may appear, a royalty of one-thirty-second (1/32) of the interest hereby conveyed in all oil, gas and other minerals, whether similar or dissimilar, produced and saved by said Grantee, its successors or assigns, free of the cost of production, as part of the consideration for this conveyance; the Mineral Investing Corporation, its successors or assigns, having free use of oil and gas for fuel for operations conducted on said premises."

By 1938 respondent had acquired oil, gas and mineral leases on a number of other tracts of land in Yoakum County, Texas; these other tracts are called "leased lands"; respondent also owned the full fee simple title to yet other tracts in that county, or to oil, gas and minerals therein, and these we term "fee lands". R. 51-53. The seventeen oil wells had been drilled on certain of these lands.

There was nothing on the Patterson land; by this time it was reasonably certain that the Patterson land was dry and it was virtually condemned. However, further drilling was indicated on some of the Yoakum County lands which would require large expenditures. But respondent was faced with the necessity of expending large sums of money in its operations in Illinois, in Colombia and on Bahrein Island. Respondent therefore cast about to sublease these lands in Yoakum County and many prospective or possible purchasers were interviewed in an effort to make the best possible trade. R. 200-201. Finally a trade was made with

the Aloco Oil Company, R. 202 et seq., which resulted in the Texas-Aloco Agreement.

Both Mr. Cole, who acted for The Texas Company, and Mr. Wynne, who acted for Aloco Oil Company, knew that the two and one-half sections of Patterson lands had no present leasehold value because they were practically condemned as dry,—they were "thrown in" merely so that The Texas Company and petitioners could get a little revenue in the way of delay rentals, one-fourth of which went to petitioners. R. 175.

It was desirable that Aloco have record leasehold estates in the lands and inasmuch as some of the Patterson lands were "fee lands" it was necessary that they be assigned to a third party who could execute to The Texas Company a lease thereon and it could then sublease to Aloco, as in the case of all the other lands included in the deal. Hence the conveyance to Tom T. Freeman, Trustee, was made so that he could execute a lease to The Texas Company and Aloco could be vested with a leasehold estate in the Patterson lands in line with the character of estate it acquired in other lands. R. 171.

If conditions should so change as to make it prudent to drill on the Patterson lands, Aloco could drill one well to 40 acres, or 40 wells, for each of which it would pay the deferred contingent bonus of $3500. This would amount to $140,000.00, of which petitioners would obtain $36,250.00 in addition to their 1/32 reserved interest in the oil. Testimony Mr. Wynne, R. 124, 125. If Aloco should drill wells on the Patterson lands the oil will be run into separate tanks—the oil

from each lease is run into its own tank, R. 225. If perchance it should develop that there is any reasonable prospect that the Patterson lands contain oil sufficient to justify drilling, Aloco will be required to promptly drill thereon. Testimony H. S. Cole, R. 261 et seq.

SPECIFICATION OF ERRORS

We have no specification of errors by petitioners to aid us. We suppose that petitioners seek to assert in substance that the Circuit Court of Appeals for the Fifth Circuit has erroneously refused to observe the local rule of law as to what constitutes royalty and bonus for an oil and gas lease on lands in Texas, thereby disallowing petitioners the recovery sought by them.

SUMMARY OF THE ARGUMENT

POINT I.

Patterson land had no bonus value and no bonus paid for leases on it.

POINT II.

Petitioners will share in $3500 to be paid by Aloco for any paying well it drills on Patterson land.

POINT III.

No conflict with applicable decisions of Supreme Court of Texas on question of local law as to what constitutes royalty under an oil and gas lease on Texas land.

POINT IV.

No conflict with decision of the Circuit Court of Appeals for the Tenth Circuit on same matter.

ARGUMENT

POINT I.

The jury found by their verdict that no bonus was paid for the leases on the Patterson land, that said land had no bonus value and that the $441,445.72 paid respondent by Aloco was not bonus but consideration for the 17 completed oil wells on lands other than petitioner'. R. 87-89. The Circuit Court of Appeals approved the verdict. R. 483.

We hardly think it necessary to go behind the jury verdict, but, if so, we say:

There was ample and convincing evidence that the Patterson land had no bonus value, that no bonus was paid for it and that the $441,445.72 was paid for said improvements on land other than the Patterson land, R. 117, 119, 122-123, 217, 220, 221-226.

POINT II.

If Aloco should drill wells on the Patterson land and produce oil in paying quantities it will be required to pay $3500 for each of said wells and petitioners will receive one-fourth thereof as a matter of course. No one disputed this; there is no controversy about it.

POINT III.

The Circuit Court of Appeals did not deviate from the local law in respect of royalty under an oil and gas lease on Texas land. A comparison of the opinion of the Circuit Court of Appeals in the case at bar, pages 485-486 of the printed record, (131 Fed. 2d at page 1001), with the opinion of the Supreme Court of Texas in *State National Bank of Corpus Christi v. Morgan*, at pages 514-17 of 135 Texas Reports (143 S. W. (2d) 757 at pages 760, 761), shows there is no basis for supposing any conflict.

In *State National Bank of Corpus Christi v. Morgan*, supra, it is pointed out and held:

Royalty and bonus in Texas each constitutes consideration for the making of an oil and gas lease, as

does also delay rental, but that does not not make them identical. Bonus is a convenient term applied indiscriminately to consideration for the lease over and above the usual 1/8 royalty, but that does not mean that royalty becomes bonus merely because it happens to be more than 1/8. Royalty is a share of the product or profit continuing through the *term of the lease.* Royalty may be, and quite frequently is, more than 1/8, but that does not change its nature. It remains royalty even though it is more than the usual in amount.

In the case at bar the Circuit Court of Appeals followed the rule stated by the State Supreme Court in the cited case.

As held by the Court, R. 485, 131 Fed. (2d) 1001:

> "These reservations of a share of the product or the profit, or both, continue throughout the term of the lease, and, therefore, come strictly within the accepted definition of 'royalty' as 'a share of the product or profit reserved by the owner for permitting another to use the property.' "

And, of course, the Circuit Court of Appeals in the case at bar does not conflict with the decision of the Texas Court of Civil Appeals in *Sheppard v. Stanolind Oil & Gas Co.*, 125 S. W. (2d) 643; that case is cited and explained by the Supreme Court of Texas in *State National Bank of Corpus Christi v. Morgan*, at pages 514, 515, 518 of 135 Texas Reports, pages 760, 762 of 143 Southwestern Reporter, Second Series.

POINT IV.

There can be no conflict between the Tenth Circuit in *Wright v. Bush*, 115 Fed. (2d) 265, and the Fifth Circuit in the case at bar, because the two courts did not have the same matter before them. The Court for the Tenth Circuit was not concerned with the local rule of law in Texas as to what constitutes royalty or bonus for an oil and gas lease on Texas land, nor was the Court for the Fifth Circuit concerned with a like question in respect of Kansas land.

———o———

It is now apparent, we think, that as a whole petitioners' case is without merit. It is based upon the extraordinary idea that they should be awarded a share in something in which they never had the slightest interest and thus be permitted to reap where they have not sown. There is no occasion for granting the writ of certiorari.

Respondent prays that the petition be denied.

HERBERT S. GARRETT,
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WALTER D. WILSON,
Attorneys for Respondent,
The Texas Company.

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PETITIONERS' MOTION FOR REHEARING ON THEIR PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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JACK M. RANDAL,
One of the Petitioners.

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PETITIONERS' MOTION FOR REHEARING ON THEIR PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioners respectfully request the Court to set aside its order entered on June 1, 1943, denying the Petition for Writ of Certiorari filed herein by J. C. Patterson, et al., and that it reconsider the Petition for Writ of Certiorari heretofore filed.

I.

Summary Statement.

This statement is made in the light of the statement made in the Petition for Writ of Certiorari and in addition thereto.

The Petitioners executed a mineral deed to the Mineral Investing Corporation (R. 37), covering two and one-half

sections of land in Yoakum County, Texas. The conveyance contains this provision:

> "It is agreed that the Mineral Investing Corporation, its successors or assigns, shall never be under obligation to lease said land for oil, gas or mineral purposes but should the Mineral Investing Corporation, its successors or assigns, lease said land for oil, gas or mineral purposes, then one-fourth (¼) of the bonus paid for said lease and one-fourth (¼) of the rentals paid under said lease shall be paid to the Grantors herein, their heirs or assigns, as a part of the consideration for this conveyance. It being understood that the amount of the bonus, rentals and royalties for which the Mineral Investing Corporation may execute a lease shall be at its sole discretion."

The Texas Company purchased the property from the Mineral Investing Corporation (R. 366). The Texas Company then leased the two and one-half sections in three several leases indirectly, through its employee, to itself (R. 370-372) for the usual one-eighth (⅛) royalty and without any bonus (R. 126 and 116. R. 54-56). The leases were dated December 30, 1938 (R. 372). The Texas Company then, by an AGREEMENT with the Aloco Oil Company (R. 109) dated December 31, 1938, which AGREEMENT was sent up to this Court as an original exhibit marked as Plaintiffs' Exhibit No. 7, assigned 15,846 acres in leases, including the three leases on the Petitioners' lands, to the Aloco Oil Company (R. 109. Pl. Ex. No. 7). The AGREEMENT was equivalent to a lease of the Patterson lands for the bonus claimed by the Petitioners, that is, their pro-rata part of the consideration for the AGREEMENT. The matter was handled in this way for the convenience of The Texas Company (R. 171). The AGREEMENT recites a consideration of $441,445.72 in cash (R. 109. Pl. Ex. No. 7). Section 8 of the AGREEMENT (R. 109. P. 38, Pl. Ex. No. 7) provides for a one-

eighth (⅛) overriding royalty. The AGREEMENT then provides, on page 29, that The Texas Company has the privilege of receiving a portion of the net profits and $3500.00 for each producing well on the 15,846 acres of land. The AGREEMENT, at page 31, provides for an additional one-eighth (⅛) overriding royalty under the conditions therein stated. The Texas Company did not try to lease the Patterson lands to anyone else (R. 136 and 175). The Petitioners, having a one-fourth bonus interest in the 1600 acres, claim 400/15,846 of the entire consideration for the AGREEMENT (R. 109). The consideration in the AGREEMENT was for the entire acreage, and, consequently, was spread over the entire acreage.

In a case where a purchaser acquires more than one tract of land by deed, and there is a vendor's lien upon one of the tracts of land, which he assumes, he thereby spreads a blanket lien over both tracts to secure the indebtedness. *Texas Land & Loan Company* v. *Watkins,* 34 S. W. 996 (Tex. Civ. App.); *Lanham* v. *West,* 209 S. W. 258 (Tex. Civ. App.) This principle is applicable here.

II.

Question Presented.

The question presented in the Petition for Writ of Certiorari is: "Is the consideration for the AGREEMENT (R. 109. Pl. Ex. No. 7), the usual one-eighth (⅛) royalty having been reserved in the lease to The Texas Company, bonus under the mineral deed described above?"

III.

Previous Opinion.

The opinion of the United States Circuit Court of Appeals is reported in 131 Fed. (2d) 998.

IV.

Reasons Justifying the Writ of Certiorari.

The Petitioners contend that under the law they are entitled to receive 400/15,846 of the consideration for the AGREEMENT (R. 109. Pl. Ex. No. 7) as bonus. The Texas Company has refused to pay them anything, and the Court of Civil Appeals confirmed that position.

In the case of *State National Bank of Corpus Christi* v. *Morgan,* 135 Tex. 509, 143 S. W. (2d) 757, by the Commission of Appeals of Texas, the Bank had conveyed to one Fisher a tract of land but reserved "an undivided one-half (½) interest in and to all of the royalty and oil and gas, casing-head gas, gasoline, and in all other minerals in and under and that may be produced and mined" from the land conveyed. Then Fisher conveyed the land to Morgan. Morgan executed three several leases on the property, and in the leases he retained: (1) one-eighth (⅛ of the oil produced and saved from the land; and (2) in the 5th paragraph of the lease he provided "In addition to all other reservations of royalties herein made and provided for the benefit of lessors, there is reserved to lessors, their heirs and assigns, the title to an undivided one-eighth of seven-eighths (⅛ of ⅞) equal part of all oil, gas, and other minerals" * * * "until the lessor shall have received the sum $48,000.00, whereupon this reservation shall terminate."

The Bank contended that it was entitled to receive a pro rata part of the reservations set out in paragraph 5 of the lease as royalties. The Court held:

> "The fact stated in the foregoing quotation, that the usual royalty in oil and gas leases is ⅛, is in our opinion one so generally known that judicial knowledge may be taken of it. Cheek *v.* Metzer, 116 Tex. 356, 291 S. W. 860, 862; Leonard *v.* Prater, Com. App., 36 S. W. (2d) 216, 220, 86 A. L. R. 499. When that fact

is accepted, the oil payments reserved in the fifth paragraph of the leases executed by Morgan are bonuses as defined in the above quotation; they are sums contracted to be paid as consideration for the leases over and above the usual royalties."

The Court also held:

"Application for writ of error was refused in Sheppard *v.* Stanolind Oil & Gas Company, Tex. Civ. App. 125 S. W. (2d) 643, 647, and thereby the determination of the principles of law declared in the opinion in that case was approved."

That part of the opinion in the above cause depended upon by the Respondent to sustain its position is dicta and is unnecessary to the decision in said cause.

Under the deed to the Mineral Investing Corporation, which interest was acquired by The Texas Company, the Petitioners are beneficiaries under a trust created by the original mineral deed:

"'A fiduciary relationship is not limited to cases of trustee and *cestui que trust*, guardian and ward, attorney and client, and other recognized legal relationships, but extends to every possible case in which there is confidence reposed on one side and a resulting superiority and domination on the other. The origin of the confidence may be moral, social, domestic, or merely personal. If the confidence in fact exists and is reposed by one party and accepted by the other, the relation is fiduciary, and equity will regard dealings between the parties according to the rules which apply to such relation.'" Grand Trunk Western R. Co. *v.* Chicago & Western Indiana R. Co., 131 F. (2d) 215.

In the case of *Surgi* v. *First National Bank and Trust Company*, 125 F. (2d) 425, by the Fifth Circuit, the court held:

"* * * where the trustee wrongfully mingles the trust property with his individual property in one indistin-

guishable mass, the beneficiary is entitled, at his option, to enforce a constructive trust on the commingled property. It finds its most usual application in connection with monies and funds which in their nature have no distinguishing marks. For the same reason it applies to other kinds of property only when they cannot be distinguished from a general mass into which trust property has gone."

The Texas Company admitted in its pleadings (R. 59) that the Petitioners were entitled to a pro-rata part of the consideration recited in the AGREEMENT when it stated that the Petitioners were entitled to a part of the $3500.00 per well for producing wells on the Patterson lands. This admission also appears on page 14 of the Brief of the Respondent in opposition to the Petition for Writ of Certiorari. The Texas Company therefore admits that at least a part of the consideration for the AGREEMENT (R. 109. Pl. Ex. No. 7) is *bonus*. It appears to the Petitioners that that admission on the prt of The Texas Company, trying to make a concession in behalf of the Petitioners, reveals that the entire consideration for the AGREEMENT is *bonus* as contended for by the Petitioners. The Petitioners do not think that The Texas Company can pro-rate the consideration for the AGREEMENT as it sees fit, calling a part of the consideration *bonus* and a part of it strictly *royalty*. The Circuit Court of Appeals did not hold that Petitioners were entitled to receive any part of the $3500.00 per producing well, and thereby denied the Petitioners the benefit of the admission in the Respondent's Brief and pleadings. The Texas Company assigned, as set out in the AGREEMENT (R. 109. Pl. Ex. No. 7) 15,846 acres, which included the 1600 acres in which the Petitioners have a 400-acre bonus interest, and by that process the Petitioners acquired an interest in the whole consideration for the AGREEMENT.

In the case of *Austin Bros.* v. *Patton*, 294 S. W. 537 (Tex. Com. App.), the Court said:

> "It is elementary in the law of evidence that, where parties have expressed their agreement in writing and the terms thereof are unambiguous, the same is conclusive and will supersede all prior agreements or stipulations unless the instrument is set aside for some equitable reason. The contract of a county is no exception to this universal rule, and neither is this character of case an exception merely because the violation of the rule of evidence would disclose a contract void as against law or public policy. It is a wholesome rule that the written contract presumptively is conclusive, until the integrity of such contract has been challenged upon some recognized equitable ground."

The Texas Company did not attack the consideration for the AGREEMENT in any manner, either in its pleadings or in its evidence. The Texas Company did not have the sole discretion of disposing of the property for any consideration which it saw fit to dispose of it.

In the case of *Cowden* v. *Broderick and Calvert*, 114 S. W. (2d) 1171 (Tex. Sup.), the Court said:

> " 'At the discretion of' may, under some circumstances, mean 'at the option of,' but usually it does not. Discretion differs from uncontrolled will. It is thus defined in *The Styria v. Morgan*, 186 U. S. 1, 22 S. Ct. 731, 734, 46 L. Ed. 1027, 1033: 'Discretion means the equitable decision of what is just and proper under the circumstances.' "

Prayer.

The Petitioners therefore respectfully pray that the order of this Court heretofore entered denying the Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit be set aside, and that the Writ of Certiorari now be granted as prayed for in the Petition.

The undersigned counsel and Petitioners hereby certify that this Motion for Rehearing is presented in good faith and not for delay.

Respectfully submitted,

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